CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Kelly L. Segraves concerning the State Board of Education's use of its "Science Framework" and the "Instructional Materials and Framework Adoption: Policies and Procedures" manual[1]	**1992 OAL Determination No. 3** [Docket No. 90-012] March 23, 1992 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 3

Determination by: MARZ GARCIA, Director

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not State Board of Education rules governing the evaluation and adoption of school science textbooks are "regulations" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the "Science Framework" and the "Instructional Materials and Framework Adoption: Policies and Procedures" manual are, at least in part, "regulations." In Engelmann v. State Board of Education, the California Court of Appeal, Third District, also found Board textbook selection guidelines to be invalid. Engelmann has been appealed to the California Supreme Court; since the appeal has not yet been resolved, the Office of Administrative Law today issues this determination, with detailed supporting reasons (initially drafted prior to the filing of the Third District decision).

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether or not the "Science Framework" (adopted by the Board of Education on November 9, 1989) and the manual entitled "Instructional Materials and Framework Adoption: Policies and Procedures" (approved by the Board on June 10, 1988[4]) (referred to jointly as the "challenged rules"), which govern the evaluation and adoption of school science textbooks are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION [5,6,7,8,9]

OAL finds that:

(1) the Board's quasi-legislative enactments are generally required to be adopted pursuant to the APA;

(2) the challenged rules are, at least in part, "regulations" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) no exceptions to the APA requirements apply;

(4) those portions of the challenged rules which constitute "regulations" violate Government Code section 11347.5, subdivision (a).[10]

REASONS FOR DECISION

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

> "The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) . . . The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).
>
> "In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.][11]

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

The State Board of Education ("Board") is the governing and policy determining body of the Department of Education ("Department").[12] The duties of the Department include the administration, oversight, and coordination of various educational programs in the state and local government.[13] The Superintendent of Public Instruction acts as executive officer of the Board and head of the Department.[14]

The Board is mandated by the California Constitution (Article IX, section 7.5) and by statute (Education Code section 60200) to adopt textbooks for use in grades one through eight.[15]

With respect to the selection of textbook materials, the Legislature has declared in Education Code section 60002 that:

> ". . . because of the common needs and interests of the citizens of this state and the nation, there is a need to establish broad minimum standards and general educational guidelines for the selection of instructional materials for the public schools . . ." [Emphasis added.]

The Board is aided in the adoption of standards and guidelines for selection of instructional materials by the Curriculum Development and Supplemental Materials Commission ("Commission"). Education Code section 33538 states in part:

> "The [Commission[16]] shall study problems of courses of study in the schools of the state and shall, upon request of the State Board of Education, recommend to the State Board of Education the adoption of minimum standards for courses of study in preschool, kindergarten, elementary, and secondary schools." [Emphasis added.]

In addition, Education Code section 60204 mandates the Commission[17] to:

> "(a) Recommend curriculum frameworks[18] to the state board.
>
> "(b) Develop criteria for evaluating instructional materials submitted for adoption so that the materials adopted shall adequately cover the subjects in the indicated grade or grades and which comply with the provisions of Article 3 (commencing with section 60040) of Chapter 1. The criteria developed by the commission

shall be consistent with the duties of the state board pursuant to Section 60200. . . ."

"(c) Study and evaluate instructional materials submitted for adoption.

"(d) Recommend to the state board instructional materials which it approves for adoption.

". . ." [Emphasis added.]

Authority [19]

Provisions of the Education Code reflect the Board's express authority to adopt regulations for the adoption of textbooks for kindergarten and grades one through eight.[20] Education Code section 33031 states in part:

"The board shall adopt rules and regulations not inconsistent with the laws of this state (a) for its own government, (b) for the government of its appointees and employees, (c) for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocational schools of the state, and (d) for the government of other schools, excepting the University of California and the California State University, as may receive in whole or in part financial support from the state." [Emphasis added.]

Education Code section 60206 states:

"The state board may adopt appropriate regulations to implement this chapter ["Elementary School Materials"]. These regulations may include a procedure to review district invoices for instructional materials purchases made pursuant to subdivision (b) of Section 60242." [Emphasis added.]

Background: This Request for Determination

This request for determination was brought by Kelly L. Segraves ("Requester"), an author and publisher of instructional materials for science courses used or to be used in grades one through eight. The Requester's instructional materials have been published and sold nationally and in California to public and private schools under the name "Science and Creation." Although not clearly stated, the Requester was apparently informed that the Board would adopt his instructional materials only if they complied with the manual entitled "Instructional Materials

and Framework Adoption: Policies and Procedures" ("Instructional Materials Manual" or "Manual") and the "Instructional Materials Criteria" set forth in Chapter 8 of the "Science Framework." The Instructional Materials Manual was prepared by the Office of Curriculum Framework and Textbook Development, approved by the Board on June 10, 1988, and thereafter published and distributed by the Department of Education. The Science Framework was adopted by the Board on November 9, 1989. It is the Manual and Science Framework (together referred to as the "challenged rules") that are the subject of this Determination.

On December 14, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,[21] along with a notice inviting public comment. No public comments were received. The Board[22] submitted its response to the request for determination ("Response") in the form of an "Appellant's Opening Brief" for the case of Engelmann v. State Board of Education, et al., (Sacramento County Superior Court No. 361906). The trial court decision was upheld December 26, 1991, by the California Court of Appeal.[23] The State Board of Education's petition for review is presently pending before the California Supreme Court. (The "Respondent's Brief" and "Appellant's Reply Brief" from the Third District proceeding were also provided.)[24] The Board asserts that the Engelmann case represents an analogous situation raising substantially similar issues.

According to the appellate briefs filed in Engelmann, the plaintiff in that case is the author of reading instructional materials sold nationally as the "Reading Mastery Program" or "DISTAR." The DISTAR materials were submitted to the Board for adoption in 1987, evaluated under the Board's "1987 English-Language Arts Framework" and the aforementioned Instructional Materials Manual, and rejected. Thereafter, plaintiff filed a petition for a writ of mandate and declaratory relief to prevent the Board from using the framework and manual as criteria for evaluating instructional materials on the grounds that the framework and manual are "regulations," without legal effect unless properly adopted pursuant to the Administrative Procedure Act. The trial court ruled in plaintiff's favor. On appeal, the Board raises several arguments for why the APA does not apply based on canons of statutory construction and the doctrine of "separation-of-powers." These points will be fully addressed in our discussion of exemptions to the APA.

II. ISSUES

The key issues in this determination are:

(1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED RULES FALL WITHIN AN EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

Government Code section 11000 states in part:

> "As used in this title [Title 2. 'Government of the State of California'] 'state agency' includes every state office, officer, department, division, bureau, board, and commission." [Emphasis added.]

Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code.

The Board is clearly a "state agency" as that term is defined in Government Code section 11000. Further, Government Code section 11342, subdivision (b), provides that, for purposes of the APA, the term "state agency" applies to all state agencies, except those in the "judicial or legislative departments."[25] Since the Board is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board's quasi-legislative enactments.[26]

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['] regulation [']as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ."
> [Emphasis added.]

In Grier v. Kizer,[27] the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

> First, is the challenged rule either
>
> - a rule or standard of general application or
> - a modification or supplement to such a rule?
>
> Second, has the challenged rule been adopted by the agency to either
>
> - implement, interpret, or make specific the law enforced or administered by the agency or
> - govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA."
> [Emphasis added.][28]

A. Are the Challenged Rules or Standards of General Application or a Modification or Supplement to Such Rules or Standards?

The answer to the first part of the inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[29] Both the challenged Manual and Science Framework are intended for use throughout the State. "[The Instructional Materials Manual] . . . details State Board of Education policy regarding curriculum framework development and instructional materials adoption."[30] The Science Framework is designed to provide state direction to school districts in the provision of instructional programs.[31] Both publications undoubtedly have impact on all publishers of instructional materials which seek adoption of their materials by the Board. The challenged rules clearly have general application and affect the types of instructional materials to be used in California.

B. Part Two - Do the Challenged Rules Establish Rules Which Interpret, Implement, or Make Specific the Law Enforced or Administered by the Agency or Which Govern the Agency's Procedure?

Instructional Materials Manual

The Manual contains numerous provisions which interpret, implement, or make specific the law requiring (1) the adoption of instructional materials for kindergarten and for grades one through eight (California Constitution, Article IX, section 7.5 and Education Code section 60200, subdivision (a)[32]); (2) the establishment of broad minimum standards and guidelines for the selection of instructional materials (Education Code section 60002); and (3) the development of criteria for evaluation instructional materials submitted for adoption (Education Code section 60204, subdivision (b)). The following are a few examples. (Where appropriate, we will point to the specific statute being interpreted, implemented or made more specific.)

4.1.2 Section 4.1.2 deals with the definition of "Basic Instructional Materials." After quoting the definition of that term contained in Education Code section 60012,[33] the Manual states:

> "By Board policy, adopted by the State Board of Education on July 10, 1987, this definition was extended operationally by the following statement:

> 'Instructional materials, each component of which is integrally necessary to teach the requirements of the intended course in a manner that is compatible with the framework adopted by the State Board of Education.' [Emphasis added.]

The stated policy attempts to make more specific the statutory definition of "Basic Instructional Materials" by narrowing the term to include only those materials which teach course requirements in a manner compatible with the framework adopted by the Board.

4.1.5 Section 4.1.5 specifies that instructional materials submitted for review and evaluation must be in accordance with the technical requirements outlined in the "Invitation to Submit." (The Manual does not contain a copy of an "Invitation to Submit" in its appendices.)

4.2 Section 4.2 provides that the price quotes shall be submitted on Instructional Materials Bid (TXT-10) forms and that such quotes "will be in effect for a two-year period, except that the prices for the seventh year will be in effect for a one-year period." It also states that "[p]rices may not be increased after the final filing date of the Price Quotation forms until the next scheduled biennial price update." Further, the section requires publishers to provide specific price information for the purchase of "State Board-Purchased Finished Materials" and "State-Printed Materials."

Section 4.2 appears to specifically implement and make more specific Education Code sections 60222 ("Submission of specifications and price schedules") and 60223 ("Revisions to price schedules.")

4.4.3 Section 4.4.3 states that the submitted instructional materials will be reviewed pursuant to the guidelines "Standards for Evaluation of Instructional Materials with Respect to Social Content" "to determine compliance with the social content requirements of the law and Board policy." (Emphasis added.) Under this section, publishers have 30 calendar days in which to respond to a notice of citation for noncompliance issued by a reviewing panel (subsection (a)) and may either appeal the citation or offer revisions to the submitted materials (subsection (b)). The section also explains the applicability of first-level appeals, second-level appeals and an action for intervention and sets forth the procedures for each of those courses of action (subsections (c), (d), (e) and (f)). In addition, section 4.4.3 provides that instructional materials which have been approved for legal compliance pursuant to Education Code sections 60040-60042[34] and 60044[35] and the Board's social content guidelines shall not be reevaluated

for legal compliance if submitted by the publisher for adoption or retention by the Board within one year of such approval, unless specified circumstances exists (subsection (g)). Further, the section outlines procedures for review of instructional materials submitted outside the normal adoption cycle (subsection (h)).

It appears that section 4.4.3 fills in those procedural gaps left open by Government Code section 60200, subdivision (d), which states in part:

> "In reviewing and adopting or recommending for adoption submitted basic instructional materials, the state board and its appropriate advisors and advisory groups shall use, and ensure that . . .:
>
> > "(2) The submitted basic instructional materials comply with the requirements of Sections 60040, 60041, 60042, 60043, 60044, 60200.5, and 60200.6, and the state board's guidelines for social content."

4.6.1 Section 4.6.1 pertains to public input in the adoption process. It provides that "[a]ll public input is to be written on the 'public comment' form." It further establishes the deadline for public comments as follows:

> "The deadline for all legal compliance-related comments is the date of completion of the official legal compliance reviews. The deadline for educational content concerns is two weeks prior to the final meeting of the Subject Matter Committee."

We note that Title 5 of the CCR presently contains regulations on the subject of public hearings and written statements from the public.[36] Regulation of those subject areas were therefore deemed by the Board to be subject to the APA. The provisions of section 4.6.1 expands upon the corresponding provisions contained in the CCR.

4.14.1 Section 4.14.1 governs whether and when a publisher may substitute a newer edition of approved materials. It provides that the Office of Curriculum Framework and Textbook Development must verify the suitability of the substitution by determining that "the new edition could be used in conjunction (i.e., side-by-side) with the old edition in a classroom environment." The section also states that:

> "The new edition substitution requests should be made during biennial price updates. Interim substitutions must be made without increases in price."

Arguably, all sections contained in part "4" of the Manual entitled "Adoption of Instructional Materials," more specifically implement, interpret and make specific Education Code section 60200, subdivisions (c) and (i). Subdivision (c) states:

> "The state board shall adopt procedures for the submission of basic instructional materials . . ." [Emphasis added.]

Subdivision (i) states:

> "Consistent with the quality criteria for the state board's adopted curriculum framework, the state board shall prescribe procedures to provide the most open and flexible materials submission system . . ." [Emphasis added.]

5.3.1 Section 5.3.1, under part 5 ("Local Options and Funding and Expenditure Regulations"), provides in part:

> "Expenditures of [Instructional Material Funds] allotted for kindergarten through grade eight are governed by Education Code Sections 60000-60363, as well as by State Board policy. The following policy governs these expenditures:
>
> - At least 80 percent must be spent on state-adopted materials.
> - Up to 15 percent may be spent on materials that have passed legal compliance review at the state level and on library/trade books.
> - Up to 5 percent may be spent on any instructional materials, as well as tests and in-service training."

The Board argues that "[the Instructional Materials Manual] is essentially a reiteration of the extensive statutory scheme which the Legislature has established."[37] The above-discussed sections of the Manual show otherwise. Those sections do not merely repeat existing law, but instead interpret, implement and make specific the law.[38]

Science Framework

The Science Framework is mostly informative, containing educational goals for instructional materials. There is, however, at least one instance in which the language of the framework crosses over into the realm of a "regulation." That example is contained in "Chapter 8. Instructional Materials Criteria." "Table One" on page 173 of the

framework, entitled "Weighing of Criteria for Adoption of Instructional Materials" sets forth the amount of weight to be given to various factors in determining the suitability of instructional materials. Table One reads:

"CONTENT (50%)
1. Material discussed in 'Content' sections is present (5%)
2. Material is treated accurately and correctly (15%)
3. Material is treated thematically (15%)
4. Depth of treatment is adequate (10%)
5. Emphasis is placed on how scientific knowledge is gained (5%)

"PRESENTATION (25%)
6. Language is made accessible to students (5%)
7. Prose is considerate and engaging; scientific language is respected (10%)
8. Science is open to inquiry, controversy, and is presented non-dogmatically (5%)
9. Science is known as an enterprise connected to society (5%)

"PEDAGOGY (25%)
10. Hands-on experience is emphasized; there is an explicit connection with real experience and problem-solving; texts and other materials are not the sole source of information (15%)
11. Instructional materials recognize cultural diversity (5%)
12. Assessment reflects experience, integration, and creativity (5%)"

The table no doubt implements, interprets or makes more specific the general mandate to adopt instructional materials for kindergarten through grade eight. More specifically, it appears to implement Education Code section 60204, subdivision (b), which requires the Commission to:

> "Develop criteria for evaluating instructional materials submitted for adoption so that the materials adopted shall adequately cover the subjects in the indicated grade or grades and which comply with the provisions of Article 3 (commencing with Section 60040) of Chapter 1. . . ."

ANALYSIS UNDER THE TWO-PART TEST LEADS US TO CONCLUDE THAT THE CHALLENGED RULES ARE AT LEAST IN PART "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED BULLETIN FALLS WITHIN AN EXCEPTION TO THE APA REQUIREMENTS.

Government Code section 11346 specifically states that APA requirements are applicable to any exercise of quasi-legislative power unless "expressly" exempted by the Legislature.[39]

The meaning of the word "expressly" seems clear. According to the American Heritage Dictionary,[40] "expressly" means "definitely and explicitly stated." It also means "in an express or definite manner; explicitly." In a usage note under the word "explicit," the American Heritage Dictionary states:

> "Explicit and express both apply to something that is CLEARLY STATED RATHER THAN IMPLIED. Explicit applies more particularly to that which is carefully spelled out: explicit instructions. Express applies particularly to a clear expression of intention or will: an express promise or an express prohibition." [Underlined emphasis in original; capitalized emphasis added.]

According to Black's Law Dictionary, "express" means:

> "clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. . . . Made known distinctly and explicitly, and not left to inference. . . . The word is usually contrasted with 'implied.'" [Emphasis added.][41]

Numerous statutes demonstrate that when the Legislature wants to expressly exempt an agency from the APA, it knows which words to use.[42]

The Board does not rely on any of the established general exceptions to the APA.[43] Instead, it argues that statutory construction requires the reading of an exemption from the APA and that alternatively, the doctrine of separation-of-powers precludes application of the APA. We disagree.

Statutory Construction

The Board posits three theories in support of its contention that "the Legislature did not intend that the APA apply to the substantive constitutionally-based textbook adoption standards and criteria used by . . . [the Board.]"[44]

A. The Board asserts that the provisions of the APA, by their own terms, apply only to statutorily-delegated rulemaking authority.

The Board cites to Government Code section 11342, subdivision (b), which reads in part:

> "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it or to govern its procedure . . ." [Emphasis added.]

While conceding that "as a general proposition, 'the law' certainly embraces constitutional provisions,"[45] the Board nonetheless argues that "the law" in this instance means statutory law. Its reasoning is based on two rules of statutory construction, one of which is that a statute should be interpreted in a manner as to remove all doubt as to its validity. This approach is premised on the notion that interpretation of the term "the law" to include constitutional provisions may violate the separation-of-powers doctrine. As will be explained in our discussion of the separation-of-powers doctrine, the Board's concern regarding a violation of that doctrine is unjustified.

The other rule of statutory construction relied on by the Board requires that every statute be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect. The Board points out that Government Code sections 11340, subdivision (e), 11342.2 and 11346 each specifically refer to "statute(s)."[46] It argues therefore that the Legislature must have intended the term "the law" in section 11342, subdivision (b), to also mean statutes, and nothing else.[47] This argument begs the question that if the Legislature had intended the term "the law" to be restricted solely to statutes then why did it not just use the word "statute," as it did in the other cited sections. The common sense answer is that the Legislature wanted to make a distinction.[48] The distinction does not conflict with any of the statutes cited by the Board.

Our conclusion that the term "the law" in section 11342, subdivision (b), encompasses constitutional provisions is consistent with the findings of our 1986 Determination No. 4,[49] in which we stated at page 10:

> ". . . for purposes of regulatory determination analysis, the 'law' to be enforced or administered includes not only statutory, but also the decisional and constitutional provisions of law."

Even assuming arguendo that the term "the law" refers only to statutes, the challenged rules would nonetheless be subject to the requirements of the APA as they, in part, implement, interpret, and make specific Education Code sections 60002, 60012, 60200, subdivisions (a), (c), (d),

(i), 60204, subdivision (b), 60222 and 60223. (See previous discussion on the question of whether the challenged rules constitute "regulations.")

B. The Board argues that "the Legislature has determined that [its] involvement in the APA regulatory process is permissive under Education Code section 60206."[50]

Section 60206 states in part:

> "The state board may adopt appropriate regulations to implement this chapter ["Elementary School Materials" - sections 60200-60316]." [Emphasis added.]

In an attempt to prove its claim, the Board applies five "canons" of statutory construction.

The first "canon" raised by the Board is that statutes should not be interpreted in a way as to render them superfluous or meaningless. The Board cites to Education Code section 33031 which states in part:

> "The board shall adopt rules and regulations not inconsistent with the laws of this state . . . (c) for the government of the day and evening elementary schools, . . ." [Emphasis added.]

The Board argues that since authority to adopt regulations has already been conferred by section 33031, section 60206 could not merely be authorizing the Board to adopt regulations; instead, it must be granting the Board the discretion to determine whether or not its rulemaking should be conducted pursuant to the APA.

The argument is not well reasoned. We initially note that the Board has confused the question of whether it must adopt regulations under section 60206 with the question of whether the adoption of regulations under section 60206 requires compliance with the APA. Further, contrary to the Board's thinking, neither sections 33031 nor 60206 are unnecessary or meaningless. While there is some overlap in the subject areas covered by sections 33031 and 60206, the statutes serve different purposes. Section 33031 mandates the promulgation of regulations for the government of schools while section 60206 merely permits the adoption of regulations to implement the textbook adoption statutes.[51]

The second "canon" mentioned by the Board relates to the permissive nature of the word "may." As indicated above, we do not dispute that the word "may" is used in the permissive sense in Government Code section 11340, subdivision (b).

The third "canon" referred to by the Board is the rule of ejusdem generis.[52] According to the Board, that canon of statutory construction provides that "[w]hen a general and particular provision are inconsistent, the latter is paramount to the former."[53] Applying the rule put forth by the Board, section 60206 controls over section 33031 as section 60206 is the more specific statute -- i.e., it empowers the Board to promulgate regulations to implement textbook adoption statutes.[54] Accordingly, in the area of textbook adoption, the Board is not mandated to adopt regulations, but may do so at its discretion. Section 60206, however, does not pertain to the substantive or procedural requirements for adopting regulations. Thus, section 60206 does not specifically govern over the same area of law as the APA and therefore does not supersede its general applicability.

While section 60206 empowers the Board to adopt regulations at its discretion, it does not exempt the Board from the requirements of the APA upon its exercise of that discretion. The absence of specific language in section 60206 requiring compliance with the APA cannot be interpreted to mean that section 60206 permits the Board to adopt regulations without such compliance. To find otherwise would lead to ludicrous results, requiring each statute empowering rulemaking to specifically state the obvious -- i.e., that the adoption of regulations cannot be inconsistent with existing law, which requires compliance with the APA.

The fourth "canon" presented by the Board is that a "long-standing administrative interpretation is significant." Basically, the Board argues that some weight should be given to the fact that "[it has] never viewed the APA [as] applicable to its constitutionally-derived textbook adoption process."[55] The weakness of this argument is self-evident. OAL is the agency authorized to enforce the APA. According the California Court of Appeal, OAL's determination of whether of not a challenged rule is a "regulation" is entitled to great weight, while the rulemaking agency's conclusion concerning whether or not APA compliance is required is entitled to no weight.[56] Accordingly, it is OAL's administrative interpretation of whether or not the APA applies to the Board's textbook standards and criteria that is significant.[57],[58]

The fifth "canon" raised by the Board is that statutes should be interpreted to remove doubt as to its validity under the separation-of-powers doctrine. As discussed above, we cannot accept this argument.

Considered individually or in combination, the rules for statutory interpretation set forth by the Board do not demonstrate that the challenged rules are exempt from the

APA. Clearly, the language of Education Code section 60206 does not contain an "express" exemption to the APA. The fact that the Board resorts to five "canons" of statutory construction in an attempt to unveil an exemption is, by itself, evidence that no "express" exemption exists.

C. The Board contends that "the specific provisions of the Education Code governing the textbook adoption process are an exception to the general provisions of the APA."[59]

The Board points to the statutory scheme located in Title 2, Part 33, Chapters 1 (sections 60000-60115) and 2 (sections 60200-60316) of the Education Code. Chapter 1, entitled "Instructional Materials," sets broad guidelines for the acquisition of instructional materials in general while Chapter 2, entitled "Elementary School Materials," sets forth general requirements for the adoption of textbooks and instructional materials for elementary schools.

The general principles for reviewing claims of disharmony between general and specific statutes stated in Natural Resources Defense Council v. Arcata National Corporation,[60] are useful in analyzing this issue. According to the Natural Resources Defense Council court:

> "Broadly speaking, a specific provision relating to a particular subject will govern in respect to that subject as against the general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate. However, it is well settled that the statutes and codes blend into each other and are to be regarded as constituting but a single statute. ONE SHOULD SEEK TO CONSIDER THE STATUTES NOT AS ANTAGONISTIC LAWS BUT AS PARTS OF THE WHOLE SYSTEM WHICH MUST BE HARMONIZED AND EFFECT GIVEN TO EVERY SECTION. Accordingly, statutes which are in pari materia should be read together and harmonized if possible. Even when one statute merely deals generally with a particular subject while the other legislates specially upon the same subject with greater detail and particularity, THE TWO SHOULD BE RECONCILED AND CONSTRUED SO AS TO UPHOLD BOTH OF THEM IF IT IS REASONABLY POSSIBLE to do so.[61]
>
> ". . . [A]s a matter of statutory interpretation the various statutes must be harmonized if it is reasonably possible. As stated [by the California Supreme Court], 'even though, in some particular or particulars, the provisions of two or more statutes apparently are in conflict one with the other, nevertheless, if possible and practicable, such SEEMING INCONSISTENCIES SHOULD BE

> RECONCILED to the end that the law as a whole may be given effect.'"[62] [All citations omitted; capitalized emphasis added; Latin term italicized in original.]

We see no difficulty with the Board complying with both Chapters 1 and 2 of Title 2, Part 33, of the Education Code and the APA. The statutory provisions do not conflict.

Even if the Education Code, or regulations adopted by the Board, contain provisions relating to rulemaking, harmonizing such provisions with the APA presents no discernable problem. Section 11346 declares that the purpose of the APA is to "establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations." (Emphasis added.) Section 11346 also provides that nothing in the APA "repeals or diminishes additional requirements imposed by any . . . statute [heretofore or hereafter enacted]." (Emphasis added.)

The Board relies on the holdings in American Friends Service Committee v. Procunier[63],[64] and Lacy v. Orr[65] to fortify its position. That reliance is misplaced.

The 1973 Procunier case involved an effort to compel the Department of Corrections to begin to comply with APA rulemaking requirements in adopting regulations applying to prison inmates. Procunier concerned a unique regulated community and was quickly rendered obsolete by subsequent legal developments. The case had, in any event, been decided on extremely narrow grounds.

Procunier interpreted two Government Code provisions: now sections 11342, subdivision (b), and 11343, subdivision (a)(3). Section 11342, subdivision (b), defines "regulation" in part as "every rule, regulation, order, or standard of general application." (Emphasis added.) Section 11343, subdivision (a)(3), provides that "every" state agency shall transmit to OAL for filing with the Secretary of State every regulation adopted or amended by it except one which:

> "Is directed to a specifically named person or to a group of [specifically named] persons and does not apply generally throughout the state." [Emphasis added.]

According to the court in Procunier, the key issue was the meaning of the phrases underlined directly above. In reaching its decision, that court stated:

> "We conclude from the foregoing that [the Department of Corrections'] rules and regulations are embraced within the exception defined by Government Code section

> [11343, subdivision (a)(3)], and are thus beyond the purview of the APA." [Emphasis added.]

We point out that Procunier did not hold that the Department of Corrections' rules were impliedly exempt from the APA because Penal Code provisions were a special statute which controlled over the inconsistent general APA. Judicial comment on this subject is indeed present in Procunier, but are in the nature of additional thoughts which tended to support the conclusion that an express exemption applied. Our research has disclosed no subsequent case which has relied on Procunier to conclude that a state agency rule was impliedly exempt from the APA. Rather, the most helpful subsequent case, Winzler & Kelly v. Department of Industrial Relations,[66] though citing Procunier, states unequivocally that agency rules are subject to the APA unless "expressly" or "specifically exempted."

The Lacy case proves even less helpful to the Board. There, the court determined that the specific hearing procedures under the Vehicle Code controlled over the general law relating to administrative procedure in hearings. Quoting from Serenko v. Bright,[67] the court stated:

> "'. . . Hearings before the Department of Motor Vehicles are controlled by the provisions of Vehicle Code section 13353 itself, and the department's hearing procedures are specific within the Vehicle Code (§§ 14100-14112) rather than the Administrative Procedures Act (Gov. Code, § 11500, et seq.)'" [Footnotes omitted; emphasis added.]

The case simply illustrates the application of the earlier discussed rule of statutory construction pertaining to specific versus general statutes. The case does not concern the rulemaking provisions of the APA. Although the court mentioned the "Administrative Procedure Act," it was obviously referring to the statutes relating to "Administrative Adjudication," not to statutes relating to rulemaking. This is clear from the subject matter of the case -- i.e., administrative hearings -- and from the court's citation to Government Code sections 11500 et seq..[68]

Separation-of-Powers

The Board argues that "[the applicability of the APA to its] textbook adoption standards and criteria--and thereby its substantive constitutionally-based textbook adoption authority-- . . . violates the separation-of-powers doctrine."[69] This view assumes that the Board's constitutional power to adopt textbooks is broad and

exclusive and that application of the APA would infringe upon the exercise of that power.

The separation-of-powers doctrine is set forth in Article III, section 3, of the California Constitution, which states:

> "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

The Board contends that although "[t]he doctrine customarily regulates the interactions between the three principal branches of government . . . it has a broader application: namely, to state agencies which derive at least some of their authority from provisions in the California Constitution."[70] The Board cites to three California Supreme Court cases[71] and two Attorney General Opinions[72] for the proposition that the Legislature may not interfere in the exercise of the Board's textbook adoption authority.[73,74]

The Board argues that applicability of the APA to the challenged rules would permit the Legislature, through OAL, to routinely intrude into actual agency decision-making. It notes that the APA is currently "more than a set of merely procedural rulemaking processes and that "proposed agency regulations now are reviewed for compliance with . . . six quasi-substantive, non-procedural standards [necessity, authority, clarity, consistency, reference and nonduplication]."[75] The Board argues that "[the Board], through its constitutional authority, not OAL and not the Governor, through statutory authority, has the exclusive authority to determine whether any one (or all) of its substantive textbook evaluation standards and criteria is/are necessary, authorized, clear, consistent, appropriately referenced, and/or nonduplicative."[76] Citing to criticism of OAL in an article published by the Center for Public Interest Law at the University of San Diego School of Law, the Board opined that:

> "Given the breadth and looseness of the six review standards set forth in Government Code section 11349.1, subdivision (a)(1)-(6) . . . it was perhaps inevitable that the OAL would sometimes overstep the six prescribed areas of agency review and intrude into the substantive side of agency rule-making."

We cannot accept the Board's argument. First, it is manifest that the Board's constitutionally-delegated authority is not all-encompassing. California Constitution, Article IX, section 7.5, merely requires the Board to adopt textbooks for grades one through eight. It says nothing of the particular standards the Board is to apply in evaluating

textbooks, or of the procedures the Board is to follow in making its textbook selections. Those particulars were left to be established by statutes[77] and regulations.[78]

The California Supreme Court cases cited by the Board recognized that only the "ultimate selection" of textbooks is within the exclusive authority of the Board. Quoting from People v. Board of Education of Oakland,[79] the Supreme Court in State Board of Education v. Levit[80] stated:

> "'Possibly the Legislature may prescribe rules by which boards shall be governed in selecting books, viz., to give notice, or to have the matter considered at some meeting called for the purpose, or other rule of machinery merely; but such legislation could not be used to take away the right of ultimate selection.'" [Emphasis in original.]

Logic dictates that if the Court in Levit had determined that the Board has exclusive control over the establishment of standards and criteria for textbook selection, as well as exclusive control over the actual selection of textbooks itself, it would not have used the phrase "ultimate selection." In addition, the Court would not have stated that the Legislature "may prescribe the rules by which boards shall be governed in selecting books." We conclude, therefore, that California Constitution, Article IX, section 7.5, grants exclusive authority to the Board only with respect to the ultimate selection of textbooks. This view was apparently shared by the Board in the Levit case.

The Levit court stated:

> "[The Board] concedes that the Legislature could provide that no textbooks should be furnished for science classes, that science classes should not be taught in grades one and two, or that science classes should not be taught in those grades with textbooks. However, it maintains that if textbooks are to be used they shall be selected by the state board. Its choice of textbooks may be affected by the amount of the appropriation which the Legislature may make, by the form in which the appropriation is made, or by curriculum regulations. However, it argues that the Legislature may not validly interfere with the ultimate selection of textbooks made by [the Board] . . . ."[81] [Emphasis added.]

The particular standards and criteria considered by the Board in making its textbook selection is not provided for under section 7.5 of the Constitution and adoption of such standards and criteria does not come under the exclusive province of the Board.

Second, we note that the Board apparently does not dispute (under the separation-of-powers doctrine) that the procedural aspects for establishing the standards and criteria for textbook adoption are subject to OAL review for compliance with the procedural requirements of the APA.[82] Thus, even assuming arguendo that the Board's separation-of-powers argument has any merit, the challenged rules are nonetheless subject to the procedural requirements of the APA and to review for compliance of such by OAL.

Third, we reject the notion that OAL would intrude into the Board's decision-making. OAL's review of the challenged rules for compliance with the APA would not impair the Board's exclusive authority over the ultimate selection of textbooks. OAL has no power to determine the particular standards, criteria or procedures for textbook adoption. OAL's role is to ensure that regulations adopted by state agencies comply with the substantive and procedural requirements of the APA. In conducting such a review, OAL is mindful of the statutory prohibition against affecting the substantive content of submitted regulations. Government Code section 11349.1, subdivision (c), states:

> "[OAL] shall adopt regulations governing the procedures it uses in reviewing regulations submitted to it. . . . The regulations adopted by the office shall ensure that it does not substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations." [Emphasis added.]

The only limitation placed on the Board's rulemaking actions is that such actions comply with the requirements of the APA.

As demonstrated, the APA has not been rendered inapplicable to the Board's adoption of rules governing textbook selection -- i.e., the challenged rules -- either by way of statutory interpretation or by virtue of the separation-of-powers doctrine. Our review also discloses that none of the generally established exceptions apply.

HAVING FOUND THE CHALLENGED RULES TO BE, AT LEAST IN PART, "REGULATIONS" AND NOT EXEMPT FROM THE REQUIREMENTS OF THE APA, WE CONCLUDE THAT THE CHALLENGED RULES VIOLATE GOVERNMENT CODE SECTION 11347.5, SUBDIVISION (a).

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) the Board's quasi-legislative enactments are generally required to be adopted pursuant to the APA;

(2) the challenged rules are, at least in part, "regulations" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) no exceptions to the APA requirements apply;

(4) those portions of the challenged rules which constitute "regulations" violate Government Code section 11347.5, subdivision (a).

DATE: March 23, 1992

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1. This Request for Determination was filed on behalf of Kelly L. Segraves by David L. Llewellyn, Jr. and Samuel B. Casey, Attorneys at Law, Western Center for Law and Religious Freedom, 15756 La Forge Street, Suite 500, Whittier, CA 90603, (213) 945-1361. The Board of Education was represented by Joe Symkowick, General Counsel, 721 Capitol Mall, Room 552, Sacramento, CA 95814, (916) 445-4694.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "64" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

In January 1992, a fourth survey of governing case law was published in 1992 OAL Determination No. 1 (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

Authorities discovered since fourth survey

One case and one statute underscore the basic principle that all state agency rules which meet the statutory definition of "regulation" must either be (1) expressly exempted by statute or (2) adopted pursuant to the Administrative Procedure Act and printed in the California Code of Regulations. In Engelmann v. State Board of Education (1991) ____Cal.App.3d____, 3 Cal.Rptr.2d 264, appeal to California Supreme Court pending, the Third District Court of Appeal held that state textbook selection guidelines were "regulations" which had to be adopted in compliance with the APA. In Engelmann, the Third District expressly overruled its 1973 decision in American Friends Service Committee v. Procunier insofar as the 1973 decision suggested that "specific" provisions in agency enabling acts could be held to control over the "general" APA (Government Code section 11346). In section 11346, the Court noted, there is an express basis for applying the APA to every other statute.

The second recent development is the legislative response to 1990 OAL Determination No. 12, which concluded that certain rules issued by the Department of Finance violated the APA. In urgency legislation (SB 327/1991), the Legislature expressly exempted such Department of Finance rules from APA rulemaking requirements. See Government Code section 11342.5.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless

> (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
>
> (2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. The manual was prepared by the Office of Curriculum Framework and Textbook Development. It was published and distributed by the Department of Education in 1988.

5. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

6. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of his Determination.

9. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356. According to Government Code section 11370:

> "Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." (Emphasis added.)

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL (916-323-6225) for a small charge.

10. Government Code section 11347.5 provides:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.
>
> "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.
>
> "(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

11. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.

12. Education Code section 33301, subdivision (a).

13. Generally set out in several sections of the Education Code.

14. Education Code sections 33004, 33301, subdivision (b), and 33303.

15. California Constitution, Article IX, section 7.5, states:

> "The State Board of Education shall adopt textbooks for use in grades one through eight throughout the State, to be furnished without cost as provided by statute."

Education Code section 60200, subdivision (a), requires the Board to adopt instructional materials for use in the public schools in kindergarten and grades one through eight in the categories of language arts, mathematics, reading, science, social science, bilingual or bicultural subjects and any other subjects, discipline, or interdisciplinary areas for which the Board determines the adoption of instructional materials to be necessary or desirable.

16. Education Code section 33539 provides that:

> ". . . 'commission' means the Curriculum Development and Supplemental Materials Commission."

17. Education Code section 60020 provides:

> "'Commission' means the Curriculum Development and Supplemental Materials Commission."

18. As defined in Education Code section 60028, "frameworks" are outlines of components of given courses of study, designed, among other things, to provide state assessment and direction to local school districts and teachers in curriculum development.

19. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices. Individual agencies--not OAL--maintain individual rulemaking mailing lists.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

20. The California Supreme Court, in State Board of Education v. Levit (1959) 52 Cal.2d 441 has declared that:

> "To the extent that the Education Code authorizes the state board to 'adopt' textbooks, it is but a restatement and recognition of the power directly conferred upon that board by the Constitution." (Id., at p. 455.)

21. California Regulatory Notice Register 90, No. 50-Z, December 14, 1990, p. 1873.

22. The Response was submitted on behalf of the Board and the Superintendent of Public Instruction by Joseph R. Symkowick, General Counsel for the Department and the Board.

23. ____Cal.App.3d____, 3 Calif.Rptr.2d 264.

24. All appellate briefs submitted by the Board were considered in rendering this determination.

25. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete analysis of why the "APA applies to all agencies," see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006),

California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

26. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

27. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.

28. Supra, 219 Cal.App.3d at p. 438, 268 Cal.Rptr. at p. 253.

29. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

30. See Instructional Materials Manual, preface.

31. Education Code section 60028.

32. Note that while the constitutional provision only mandates the adoption of textbooks for grades one through eight, section 60200, subdivision (a), mandates the adoption of textbooks for kindergarten and grades one through eight.

33. Education Code section 60012 states:

> "'Basic instructional material' means instructional materials designed for use by pupils as a principal learning resource and which meet in organization and content the basic requirements of the intended course."

34. Sections 60040, 60041 and 60042 pertain to the character of instructional materials to be adopted for use in schools. Section 60040 permits the adoption of only those materials that accurately portray the cultural and racial diversity of our society. Section 60041 permits the adoption of only those materials that accurately portray humanity's place in ecological systems, the need to protect the environment and the effects of use of tobacco, alcohol, drugs and other dangerous substances on the human system. Section 60042 requires that the instructional materials adopted for use in schools be deemed necessary and proper to encourage thrift, fire prevention and the humane treatment of animals and people.

35. Section 60044 prohibits the use of instructional materials containing any matter reflecting adversely upon persons because of their race, color, creed, national origin, ancestry, sex, handicap, or occupation or containing sectarian or denominational doctrine or propaganda contrary to law.

36. Regulation sections 18460-18464 and 18533.

37. Response, p. 51.

38. The Board also focuses our attention to the fact that OAL had previously determined, under its AB 1111 review that certain regulations were superfluous to the statutory scheme already in place. It contends, therefore, that OAL has determined that "sections 18460-18464 and 18533 of Title 5 [of the California Code of Regulations] were all the regulations necessary to set forth its governing procedures, above and beyond the constitutional and statutory framework already in place." (Response, p. 52.)

    Again, the Board's argument has no merit. Our determination of the appropriateness of existing regulations under our AB 1111 review does not restrict the adoption of regulations necessary to govern rulemaking procedures. Certainly, our AB 1111 review of the Board's regulations did not result in a substitution of the Board's rulemaking procedures over those of the APA.

    Regulation sections 18460 through 18464 prescribe procedures governing "Public Hearings," while regulation section 18533 pertains to "Written Statements from the Public." The fact that the Board has adopted these few governing regulations with OAL approval does not signify that the "basic minimum" APA requirements have been waived. The clear intent of Government Code section 11346 is that <u>both</u> APA procedural requirements <u>and</u> any particular procedural requirements adopted by the rulemaking agency are to apply.

39. In 1947, the Legislature enacted the following APA provision:

    "It is the purpose of this article to establish <u>basic minimum procedural requirements for the adoption</u>, amendment or repeal <u>of administrative regulations</u>. Except as provided in section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article <u>shall not be superseded or modified</u> by any subsequent legislation except to the extent that such legislation shall do so <u>expressly</u>." [Emphasis added.]

In 1947, the above provision was numbered Government Code section 11420. Despite the dramatic rewriting of the APA in 1979 which led to the creation of OAL, this section was reenacted unaltered, except for renumbering as section 11346. Section 11346 thus represents a clear and strong legislative policy of 42 years standing, which was reaffirmed and underscored by the determined 1979 legislative effort to establish a central quality control authority to review state agency rules.

40. 2d College Ed. (1982), pp. 478-79.

41. (5th ed., 1979) at p. 521; see Ganyo v. Municipal Court,(1978) 80 Ca.App.3d 522, 529. Under the heading "express authority," Black's also states: ". . . An authority given in direct terms, definitely and explicitly, and not left to inference or implication, as distinguished from authority which is general, implied, or not directly stated or given." (Emphasis added.)

42. Respondent's Brief (pages 27-28) cites to statutes from various codes including the Education Code which illustrate specific language used by the Legislature in exempting rulemaking from the APA.

43. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

    c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

    d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

    e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like Grier v. Kizer, 1990 OAL Determination No. 6 rejected the idea that City of San Joaquin (cited above) was still good law.

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from

the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $162.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

44. Response, p. 15.

45. Reply Brief, p. 3. In arguing that "the law" refers to both constitutional and statutory law, the Respondent's Brief stated the following:

> "A constitutional provision is plainly law. The law is expressed by the Constitution, as well as by statutes. Civil Code §§ 22, 22.1(a). 'The written law of this state . . . is contained in its Constitution and statutes. . . .' Code of Civil Procedure § 1897. Courts must take judicial notice of 'the decisional, constitutional, and public statutory law of this state. . . .' Evidence Code § 451(a). As Justice Puglia has written, the California Constitution 'is the supreme law of the state. . . .' Pooled Money Investment Bd. v. Unruh, 153 Cal.App.3d 155, 160 (1984)."
> (Respondent's Brief, pp. 19-20.)

46. Section 11340, subdivision (e), states:

> "There exists no central office in state government with the power and duty to review regulations to ensure that they are written in a comprehensible manner, are authorized by statute and are consistent with other law." [Emphasis added.]

Section 11342.2 states:

> "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." [Emphasis added.]

Section 11346 states in part:

> ". . . Except as provided in Section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

47. The Board relies solely on the language of the cited statutes to demonstrate that the Legislature intended that the term "the law" refers only to statutes.

48. The intent to distinguish between the use of "statute" versus "the law" is reflected in Government Code section 11340, subdivision (e), which states:

> "There exists no central office in state government with the power and duty to review regulations to ensure that they are written in a comprehensible manner, are authorized by statute and are consistent with other law." [Emphasis added.]

49. Board of Equalization, June 25, 1986 Docket No. 85-005), CANR 86, No. 28-Z, July 11, 1986, p. B-7; typewritten version, p. 10.

50. Response, p. 21, fn. omitted.

51. As pointed out in the Respondent's Brief, while some overlap exists, similar overlapping exists throughout the codes. (Respondent's Brief, p. 29, for examples.)

52. Black's Law Dictionary (5th ed., 1979) states at page 464:

> "Under 'ejusdem generis' canon of statutory construction, where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." [Citation omitted.]

53. Response, p. 25, citing Code of Civil Procedure section 1859.

54. The Board agrees that section 60206 should be applied in the context of textbook adoptions rather than the general provision of section 33031. (Reply Brief, p. 9.)

55. Reply Brief, p. 11.

56. Grier v. Kizer (1990) 219 Cal.App.3d 422, 435.

57. See note 4.

58. The Board's administrative interpretation that the APA does not apply to regulations concerning the adoption of instructional material is not significant. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1226, 236 Cal.Rptr. 853, 857, the court stated:

> "When an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will ordinarily be followed if not clearly erroneous. . . .
>
> "The rule is applied to administrative regulations promulgated by an administrative body authorized to promote a statute's purposes. . . . Conversely, an 'administrative construction' which has not been promulgated in substantial compliance with the [APA] merits no weight as an agency interpretation. . . ." [Emphasis added.]

59. Response, p. 28.

60. (1976) 59 Cal.App.3d 959, 131 Cal.Rptr. 172.

61. Supra, 59 Cal.App.3d at p. 965, 131 Cal.Rptr. at pp. 175-176.

62. Supra, 59 Cal.App.3d at p. 971, 131 Cal.Rptr. at p. 180.

63. (1973) 33 Cal.App.3d 370, 109 Cal.Rptr. 22.

64. See note 2 (Engelmann, if upheld, would overrule part of Procunier).

65. (1969) 276 Ca.App.2d 198, 81 Cal.Rptr. 276.

66. (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 746.

67. (1968) 263 Cal.App.2d 682, 689, 70 Cal.Rptr. 1.

68. The history note to Chapter 5 ("Administrative Adjudication," sections 11500 et seq.) of Title 2, Division 3, of the Government Code, contained in West's annotated codes, reveal that it was originally added under the heading "Administrative Procedure."

69. Response, p. 32.

70. Response, p. 46.

71. State Board of Education v. Levit (1959) 52 Cal.2d 441; Smith v. State Board of Control (1932) 215 Cal. 421; People v. Board of Ed. of Oakland (1880) 55 Cal. 331.

72. Elementary School Textbooks, 41 Ops.Cal.Atty.Gen. 146, 148 (1963); State Board of Education, Effect of the Enactment of Senate Bills 831 and 832 (1943) Upon the Powers and Duties of the Board, 1 Ops.Cal.Atty.Gen 429, 431 (1943).

73. The Board argues that, like other agencies whose power originates in some degree from the Constitution, its constitutionally-derived powers are self-executing and may not be restricted by statute. (Response, p. 39.) Not so. The court in Flood v. Riggs (1978) 80 Cal.App.3d 138, 154, stated:

> "[A]lthough a constitutional provision may be self-executing the Legislature may enact legislation to facilitate the exercise of the powers directly granted by the Constitution."

Thus, the fact that Article IX, section 7.5 of the California Constitution is self-executing does not preclude the application of the APA to the Board's textbook policies. (The Respondent's Brief, at page 17, lists cases which have held that statutes may provide specific procedures for the exercise of authority conferred by self-executing constitutional provisions.)

74. The Board also contends that special deference is due to its constitutional textbook adoption authority. (Response, p. 49.) Its claim is based on the California Supreme Court case of Strumsky v. San Diego County Employees' Retirement Assn. (1974) 11 Cal.3d 28, 35, which states:

> ". . . insofar as specific constitutional provisions relating to individual agencies in question directly vest judicial power in them, the agencies so favored can perform judicial functions to the extent of the grant without offending the doctrine of separation of powers. [Citation omitted.] Thus, even though a vested fundamental right be involved, the determination of the agency on factual issues is entitled to all the deference and respect due a judicial decision." [Emphasis added.]

We are at a loss as to how the language of Strumsky is applicable. That case recognized that the separation-of-powers doctrine allows for an agency to exercise judicial powers if such powers were directly vested to the agency by the California Constitution. Article IX, section 7.5 of the Constitution does not vest the Board (directly or otherwise) with judicial power. Further, even if it had directly vested the Board with such power, the Board's determination as to whether "any one (or all) of its substantive textbook evaluation standards and criteria is/are necessary, authorized, clear, consistent, appropriately referenced, and/or nonduplicative" is not limited to findings of fact.

75. Response, p. 43.

76. Response, p. 48.

77. For example, Education Code sections 60002, 60200, and 60204.

78. For example, sections 18460-18461 of Title 5 of the CCR.

79. (1880) 55 Cal.331, 335.

80. (1959) 52 Cal.2d 441, 463.

81. Id., at p. 466.

82. The Board acknowledges that procedural requirements relating to notice, hearing, and comments are mere "rules of machinery" within the purview of the Legislature. (Response, pp. 40-41.)